

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 28 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0377-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ROBERT WILLIAM DUTCHER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR21173

Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Robert W. Dutcher

Florence
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Robert Dutcher seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged the court had imposed an unlawful sentence and therefore lacked subject matter jurisdiction. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Dutcher has not sustained his burden of establishing such abuse here.

¶2 After a jury trial held in his absence, Dutcher was convicted of one count of sexual abuse of a minor, two counts of child molestation, and six counts of sexual conduct with a minor. The trial court sentenced Dutcher to presumptive prison terms of seventeen and twenty-eight years, respectively, on the first two counts and to life terms without the possibility of parole for thirty-five years on each of the remaining counts. The court ordered each term to be served consecutively to the previously imposed term. This court affirmed his convictions and sentences on appeal. *State v. Dutcher*, No. 2 CA-CR 89-0397 (memorandum decision filed Oct. 12, 1989).

¶3 Dutcher subsequently petitioned for post-conviction relief, arguing trial counsel had been ineffective. The trial court denied relief, as did this court on review. Dutcher again petitioned for post-conviction relief, raising another claim of ineffective assistance of counsel, arguing his sentence had been illegal, and asserting that the court had lacked subject matter jurisdiction. The trial court again denied relief and this court adopted its order on review.

¶4 Before this court’s mandate had issued, Dutcher filed a “[p]etition for state writ of habeas corpus,” which the trial court properly treated as a Rule 32 petition. *See* Ariz. R. Crim. P. 32.3. In that petition Dutcher argued the court had lacked subject matter jurisdiction, apparently because it had imposed an illegal sentence when it ordered consecutive rather than concurrent sentences, and had thereby “ma[de] the whole proceeding structurally a nullity.” The court denied relief, concluding Dutcher had not “cite[d] any legal authority supportive of his claim[s]” and had therefore failed to comply with Rule 32.5.

¶5 On review, Dutcher reurges the arguments he raised below, and argues the trial court abused its discretion in denying relief based on his lack of legal citation because he lacks access to “‘legal material[s]’ from or for [his] period of Rules, statutes and procedure to research.” We agree with the court that Dutcher failed to cite legal authority to support his apparent contention that an illegal sentence could create a lack of subject matter jurisdiction. But, even if we were to accept Dutcher’s claim that he cannot be required to comply with the requirements of Rule 32.5 due to lack of legal resources, the court properly dismissed the petition because Dutcher’s claims are meritless and precluded.

¶6 To the extent Dutcher suggests he may challenge the legality of his sentence at any time because such a claim is jurisdictional in nature, he is mistaken. *See State v. Bryant*, 219 Ariz. 514, ¶ 17, 200 P.3d 1011, 1015 (App. 2008) (claim of illegal sentence does not implicate court’s subject matter jurisdiction). The purported illegality of Dutcher’s sentence is not an issue related to subject matter jurisdiction but rather a

claim of error that can be forfeited. Dutcher could have raised the claim that his sentences should have been concurrent rather than consecutive on direct appeal and because he failed to do so, he is precluded from raising this claim in a Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3). Accordingly, although we grant review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge